IN THE HIGH COURT OF JUDICATURE FOR
RAJASTHAN
AT JAIPUR BENCH, JAIPUR.

O R D E R

Dharam Singh

Versus

State of Rajasthan & Ors.

S.B. CIVIL WRIT PETITION NO.3074/2006.

Date of Order : 19 November, 2007.

PRESENT

HON'BLE MR.JUSTICE MOHAMMAD RAFIQ

Shri S.M. Mehta, Senior Advocate with
Shri Rajendra Prasad for the petitioner.
Shri R.N. Mathur with
Shri Ashvini Jaiman for respondent No.2.
Shri B.K. Sharma, Deputy Government Advocate for the State.

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Reportable

This writ petition has been filed with the prayer that a mandamus be issued quashing the order dated 13/4/2006 whereby the government decided to keep its earlier order dated 19/9/2005 in abeyance. Order dated 19/9/2005 was passed by the government in exercise of its powers under Section 39 of the Rajasthan Panchayati Raj Act, 1994 (in short, “the Act of 1994”) vide which, respondent No.2

was declared disqualified to continue to hold the office of Member, Panchayat Samiti Buhana, District Jhunjhunu and consequentially, as Pradhan thereof on account of his pre-election disqualification contained in Section 19(gg) of the Act of 1994. Order dated 13/4/2006 was passed on a review petition filed by respondent No.2 before the government wherein he raised a grievance that the same was passed without giving him opportunity of hearing. Apart from the aforesaid prayer, two more prayers have been made in the writ petition, one, for issuing a writ of prohibition and another, for a writ of *quo warranto*. Writ of prohibition is sought against the State Government restraining it from proceeding further in the review petition filed by the respondent No.2 on the premise that the government having once passed the order dated 19/9/2005 under Section 39 of the Act of 1994, did not thereafter wield any power to review it. Writ of *quo warranto* is prayed to be issued on the ground that respondent No.2 being disqualified in view of the provisions of Section 19(gg) of the Act of 1994, is not eligible to continue as Member and Pradhan of

the Panchayat Samiti Buhana and therefore, his election being *void ab initio* and invalid, he should be declared disentitled to continue as such and may be ordered to be removed as member as well as Pradhan of Panchayat Samiti Buhana.

2) During the pendency of the writ petition, one of the questions involved in this petition on which depended the decision of the first prayer was referred to the Larger Bench of this Court. The Larger Bench by majority decision in **Smt. Sameera Bano Vs. State of Raj. & Ors. : 2007 (2) WLC (Raj.) 526** held that a pre-election disqualification can be adjudicated only in an election petition before the District Judge under Section 43 of the Act read with rule 80 of the Election Rules and cannot be determined by the competent authority under rule 23 of the Rajasthan Panchayati Raj (Election) Rules, 1994. Shri Sagar Mal Mehta, learned senior counsel for the petitioner while making his arguments in the present matter in view of the aforesaid judgment of the Larger Bench, did not press the first prayer of writ of mandamus and in my view, rightly, though even

otherwise, the aforesaid judgment being of the Larger Bench, sitting singally, I would be bound by law enunciated therein. That prayer therefore should be taken to have been rejected in terms of the judgment of the Larger Bench referred to hereinabove. Since the acceptance of second prayer would be depended on the petition being allowed on the first prayer, the first prayer having thus been taken as given up and/or rejected, as a necessary corollary thereto, second prayer for issuance of writ of prohibition restraining the respondents from proceeding further in the review petition filed by respondent No.2 is also therefore rejected. The writ petition therefore survives only in respect of third prayer of writ of *quo warranto* declaring the election of respondent No.2 as member as well as Pradhan of the Panchayat Samiti Buhana as *void ab initio* and respondent No.2 as usurper of those offices directing his removal therefrom. Learned counsel for the contesting parties have thus confined their arguments on third prayer of this writ petition for issuing a writ of *quo warranto* and it is on that basis that the present writ petition is being

decided.

3) Factual scenario which in this petition is required to be noticed first is that the respondent No.2 Harpal Singh filed his nomination paper for election of Ward No.25 of the office of Pradhan of Panchayat Samiti Buhana on 13/1/2005 accompanied by his affidavit attested on the same date by Shri J.P. Sharma, Notary Public, in which he declared that no criminal case was pending against him inasmuch as, no court has ever taken cognizance against him in a criminal case. No objection at the relevant point of time was raised by any of the candidates. Nomination paper of the respondent No.2 was accepted as correct in scrutiny which too was held on 13/01/2005. Voting took place on 29/01/2005 and counting of votes took place on 08/02/2005 and result of the election was declared on 08/02/2005 itself on which date, respondent No.2 was declared as Member of Ward No.25 of Panchayat Samiti Buhana. Respondent No.2 thereafter submitted his nomination paper for contesting election to the office of Pradhan, Panchayat Samiti, Buhana on 10/2/2005 which was scrutinized on the same day and upon being found valid, he was allowed to contest

the election held on 10/2/2005 itself. Result of the election was declared on very same day in which respondent No.2 was declared elected as Pradhan of Panchayat Samiti Buhana. Petitioner submitted an application to the respondents on 02/07/2005 alleging therein that respondent No.2 could not be legally allowed to contest the aforesaid election/s since he was disqualified to contest such election in view of Section 19(gg) of the Act of 1994 because FIR No.407/1995 for offences under Section 420, 467, 468 and 471 IPC was registered against him on 20/10/1995 with Police Station Kotwali, District Jhunjhunu. Upon completion of investigation, challan was filed against him before the court of competent jurisdiction on 07/04/1997 and the aforesaid matter was registered as Criminal Case No.62/1997 in the court of learned Civil Judge (Senior Division)-cum-Chief Judicial Magistrate Jhunjhunu. The said court had taken cognizance against the petitioner for the aforementioned offences on 28/06/1997 and has in fact framed charges against him for those offences on 01/10/1999 and the matter was presently pending for evidence of the

prosecution. It is in the backdrop of the aforesaid facts that the present petition has been filed.

4) I have heard Shri Sagar Mal Mehta, learned senior counsel assisted by Shri Rajendra Prasad, Advocate, Shri Rajendra Narain Mathur assisted by Shri Ashvini Jaiman and Shri B.K. Sharma, learned Deputy Government Advocate for the State of Rajasthan.

5) Shri Sagar Mal Mehta, learned senior counsel for the petitioner argued that larger bench of this court in Smt.Sameera Bano while relying on the judgment of the Supreme Court in **K.Venkatachalam Vs. A. Swamickan : AIR 1999 SC 1723 : 1999(4) SCC 526** has held that any person can approach the High Court under Article 226 of the Constitution and seek ouster of the successful candidate from the office by a writ of *quo warranto* and argued further that for seeking writ of *quo warranto*, the present writ petition would be maintainable, the petitioner having contested the election and not filed election petition notwithstanding. It was argued that though respondent No.2 was fully aware of the

aforesaid disqualification but he deliberately did not disclose the same and submitted a false affidavit. The petitioner came to known about the same when he applied for obtaining certified copy of the court proceedings on 21/05/2005 and thereafter received certified copy on 24/05/2005, information of which was given by him to the respondent No.2 on 25/05/2005. Since such information was received by the petitioner after expiry of period of limitation for filing election petition challenging his election as Member, Panchayat Samiti, Buhana held on 08/02/2005 and Pradhan thereof on 10/02/2005, the petitioner could not file the election petition. Shri Sagar Mal Mehta, learned senior counsel further argued that mere non filing of the election petition by the petitioner would not debar the petitioner from approaching this Court in a writ of *quo warranto* particularly when the larger bench in Smt.Sameera Bano supra in paras 33 and 34 of the report has conclusively held that any person can approach the High Court under Article 226 of the Constitution of India and seek ouster of the successful candidate from the office by a writ

of *quo warranto*. Shri Sagar Mal Mehta, learned senior counsel for the petitioner in this connection heavily relied on the judgment of Supreme Court in K.Venkatachalam supra and argued that in that case too, the original writ petitioner was the candidate who had contested the election against the elected candidate and lost and yet did not file election petition. It was argued that this factor would not in any manner restrict or otherwise limit the power of this Court for issuing of a writ of *quo warranto.* Learned senior counsel further relied on the full bench judgment of the Punjab & Haryana High Court in **Lal Chand Vs. State of Haryana and others : AIR 1999 P & H 1** in which it was held that election of Panchayat/Municipality can be directly challenged before the High Court under Articles 226 and 227 of the Constitution of India and the bar contained in Articles 243-O and 243-ZG of the Constitution of India would not apply to exercise of power of judicial review by this Court under Articles 226 and 227 of the Constitution of India and Article 32 of the Constitution of India, by the Supreme Court. He also cited the

Single Bench judgment of this Court in **Bhiva Ram and others Vs. State of Rajasthan and others : 2000(3) W.L.C. (Raj.) 645** in which also similar view was taken by the court while relying on the authority of Supreme Court in K.Venkatachalam supra and Full Bench judgment of Punjab and Haryana High Court in Lal Chand supra. Learned counsel also relied on the constitutional bench judgment of the Supreme Court in L.Chandra Kumar Vs. Union of India and others (1997) 3 SCC 261 and argued on the basis of that authority the powers of judicial review conferred on this court by Articles 226 and 227 of the Constitution can not be curtailed or restricted in any manner, the same being part of basic structure of the Constitution.

6) Shri Sagar Mal Mehta, learned senior counsel for the petitioner in response to the plea taken by the respondent No.2 in his counter affidavit argued that even if the respondent No.2 has been subsequently acquitted in the aforesaid criminal case, the acquittal would not relate back to the date on which his nomination paper was filed and scrutinized because the question for

determination of the court is whether nomination paper of the respondent No.2 was validly filed and accepted on the date on which he submitted his nomination paper and made a false declaration on oath. Shri Sagar Mal Mehta, learned senior counsel in this connection relied on the judgment of the Constitution Bench of the Supreme Court in **K.Prabhakaran Vs. P.Jayarajan : AIR 2005 SC 688** in which it was held that question of disqualification is to be determined only with reference to date of election or date of scrutiny of nomination papers. Subsequent setting aside of conviction and sentence in appeal does not have the effect of wiping out disqualification from back date. It was therefore prayed that writ of quo warranto be issued directing removal of respondent No.2 from the office of Member as well as Pradhan of Panchayat Samiti Buhana.

7) Shri R.N. Mathur, learned counsel appearing for respondent No.2 opposed the writ petition and argued that government vide its order dated 13/4/2006 merely reviewed the order of removal of respondent No.2 dated 19/9/2005 on the limited ground that

opportunity of hearing was not provided to him and therefore held the same in abeyance. The Full Bench decision in Smt.Sameera Bano however does not permit a defeated candidate to file writ of *quo warranto*, for that judgment in para 33 of the report clearly makes a distinction between a third party approaching this Court and a defeated candidate. It was held by the Full Bench that the mere fact that a third party cannot challenge the election of successful candidate despite his disqualification under Section 43 does not mean that election cannot be challenged at all. Any person can approach the High Court under Article 226 of the Constitution and seek ouster of the successful candidate. It is further argued that those observations were made in the context of the argument that no remedy would be available to a third party and the expression 'any person' has to be construed in that sense. By necessary implication therefore a defeated candidate who had the remedy of filing election petition and did not do so, should be taken to have given up right to challenge the election and writ of *quo warranto* filed at the

instance of such defeated candidate would not be maintainable. In concluding para 39 of the judgment of Smt.Sameera Bano supra the larger bench has therefore rightly answered the reference in no certain terms that pre-election disqualification can be adjudicated only in an election petition before the District Judge under Section 43 of the Act read with rule 80 of the Election Rules and cannot be adjudicated by the authority under rule 23 of the Rules. It was argued that since the petitioner had not produced the so-called affidavit dated 13/10/2005 with the writ petition on the basis of which he alleges that respondent No.2 concealed the factum about cognizance having been taken against him by the court for the above referred to offences, nothing stands established whereas in the case of K.Venkatachalam, the court proceeded on established facts that name of the elected candidate was not included in the electoral roll of the assembly constituency concerned. Learned counsel then made a distinction between a mere disqualification and lack of basic qualification and argued that while K.Venkatachalam was a case of lack of basic

qualification whereas in the present case, the petitioner is alleged to be disqualified in view of Section 19(gg) of the Act of 1994. When in course of time the petitioner has been acquitted in that criminal case vide judgment of the court dated 15/10/2005, that disqualification, if at all there was any, has now ceased to operate. In support of this argument, learned counsel has produced before the court certified copy of the judgment dated 15/10/2005 acquitting the respondent No.2 which was taken on record. It was argued that despite the Supreme Court having taken a view in K.Venkatachalam supra that a writ of *quo warranto* may be issued to unseat an ineligible elected candidate, the view taken by the Supreme Court in **Election Commission Vs. Saka Venkata Rao : AIR 1953 SC 210** has not been overruled thereby which was with regard to the interpretation of Article 329(b) of Constitution of India in respect of a disqualification based on conviction of the elected candidate anterior to the date of his election. In Saka Ventakata Rao, the Hon'ble Supreme Court had taken a view that Articles 190 to 193 are applicable to an elected

member. Neither the Governor nor the Election Commission had the jurisdiction to inquire into his disqualification. Learned counsel cited yet another unreported judgment of Supreme Court in **State of Himachal Pradesh and ors. Vs. Surendra Singh (Appeal No. (Civil) 5186/2006 decided on 24/11/2006** and argued that in that case too, it has been held that the argument of pre-election disqualification can be agitated only in an election petition. In that case, referring to the constitutional scheme and Article 243-O of the Constitution of India, it was held that no remedy except the election petition would be available in relation to disqualification of an elected member. In that view of the matter, learned counsel argued that remedy Article under Article 226 of the Constitution of India would not be available because of express bar contained in Article 243-O of the Constitution of India. It was argued that reliance placed on **L.Chandra Kumar (1997(3) SCC 261)** is misplaced because in that case Parliament by the Administrative Tribunal Act, 1985, had completely excluded the writ jurisdiction of the High Court over the matters falling within

the scope of the Central Administrative Tribunal where the aggrieved person could file special leave petition against the judgment of the Tribunal only before the Supreme Court. There is no such absolute bar in the present scenario where remedy of election petition is always available to the defeated candidate.

8) Lastly, Shri R.N. Mathur, learned counsel argued that though this court possess the power of judicial review under Article 226 of the Constitution but this being a discretionary remedy, writ of quo warranto may not be issued in every case and for that matter, in the present case, firstly for the simple reason that the petitioner inspite of having the remedy of filing election petition within the time specified, did not avail of such remedy. Secondly, the writ petition is grossly delayed as the election to the office of Member was conducted on 29/01/2005 and the writ petition has been filed on 15/04/2006 and thirdly the issuance of such a writ of *quo warranto* now in the changed scenario would be an exercise in futility because the disqualification, if at all there was any, now stands removed in view of acquittal of the

respondent No.2 by judgment of the trial court dated 15/10/2005 and by application of theory of relation back, the factum of his innocence having been so established would relate back to the date of election as if no criminal case was ever pending against him. In support of his aforesaid argument, Shri R.N. Mathur, learned counsel appearing for respondent No.2 has relied on the judgments of the Andhra Pradesh High Court in **Mocherla Venkataraya Sarna Vs. Sivarama Prasad and others : AIR 1961 AP 250** and Orissa High Court in **Haladhar Panda Vs. Nisakar Naik and others : AIR 1973 Orissa 132.** Learned counsel for respondent No.2 therefore argued that writ petition may be dismissed with costs.

9) I have given my anxious consideration to the rival submissions made at the bar and perused the material forming part of record.

10) In any nature of writ petition filed under Article 226, whether mandamus, prohibition, certiorari or quo warranto, scope of examination of the subject matter of the controversy in exercise of power of judicial review by this court would be confined to the facts which are admitted by the contesting

parties and therefore accepted as proved or assumed to be proved on the basis of their pleadings and proof furnished by them. Here, the petitioner categorically asserts about registration of the criminal case against the respondent No.2 being FIR No.407/95 on 20/08/1995 with PS Kotwali, Jhunjhunu for offences under Sections 420, 467, 468, 471 IPC and upon completion of investigation, filing of charge-sheet against him on 07/04/1997 in the court of CJM Jhunjhunu and thereafter cognizance taken against him by the trial court for the aforesaid offences on 28/06/1997 followed by framing of charges for those offences on 01/10/1999. His assertion thus leads to this that the date on which the petitioner filed his nomination papers for election to the office of Ward No.25 of Panchayat Samiti, Buhana on 13/01/2005 and thereafter office of Pradhan, Panchayat Samiti, Buhana on 08/02/2005, though on that day he suffered disqualification in the meaning of Section 19(gg) of the Act. Section 19 enumerates number of disqualifications on account of which a person may be debarred from contesting the election, one of which

contained in its clause (gg) is to the effect that a person registered as a voter in the list of a Panchayati Raj election shall be disqualified for election as a Panch or as the case may be, a member of such Panchayati Raj Institution if such person is under trial in the competent Court which has taken cognizance of the offence and framed charges against him of any offence punishable with imprisonment for five years or more. All the offences of which charges were framed against the petitioner were inevitably punishable with imprisonment for more than five years.

11) Now, defence of the respondent No.2 in his counter affidavit is three fold:-

(1) In the first place, he asserts that he was implicated in a false case and after recording evidence trial court has acquitted him.

(2) His second assertion is that this fact should not taken as a circumstance against him because the petitioner has not produced copy of the affidavit allegedly submitted by him to the election officer on 13/01/2005.

(3) His third assertion is that now when he has been acquitted of all the charges, the disqualification, if any, with which he allegedly suffered should be taken to have been removed from inception by application of relation back theory.

12) All these defences are evasive in nature and none of them contain a direct denial to the basic fact so specifically pleaded by the petitioner that the petitioner was disqualified to contest election in view of bar contained in Section 19(gg) of the Act of 1994. This court has to therefore proceed on the footing that the petitioner suffered from the disqualification contained in Section 19(gg) of the Act and that, as on the date on which he submitted his nomination paper, he did not disclose this fact in his nomination paper, and that had he disclosed this fact in his nomination papers, the same in all probabilities would have been rejected and then proceed to examine the matter on merits.

13) Before, however, the matter is

examined on merits of the case, let me first deal with the objection raised by the respondent No.2 as to locus of the petitioner in praying for issuance of a writ of *quo warranto*. Question that primarily arises for consideration of this court on this aspect is whether a candidate having contested the election and defeated can approach this court under Article 226 for issuance of writ of *quo warranto* inspite of the fact that he had the remedy of election petition but he did not avail of the same. What is sought to be argued on behalf of respondent No.2 is that Full Bench judgment of this Court in para 33 of the report reserved that right to only a third party and observed that any person can approach this court under Article 226 of the Constitution and seek ouster of the successful disqualified candidate from the office by a writ of *quo warranto,* meaning thereby, such remedy would be available to only a person other than the unsuccessful candidate. The discussion made in para 33 of the Full Bench judgment was founded on the ratio of the Supreme Court judgment in K.Venkatachalam supra but the observations which were made in

para 33 were made in context of the argument raised by the respondent that if unsuccessful candidate does not challenge the election in collusion with the successful candidate or otherwise, election may never be called in question at all even though such person was disqualified for election. It was in that context that the court observed that the fact that the third party cannot challenge the election of the successful candidate despite his disqualification under Section 43 does not mean that the election cannot be challenged at all because any person can approach the High Court under Article 226 of the Constitution. Those observations in the Full Bench judgment thus cannot be read divorced from the context. But, to read into that the court intended to absolutely exclude the unsuccessful candidate from approaching this court under Article 226 of the Constitution would not be a correct understanding of the observations made by the Full Bench. When it has been held that any person can approach this Court under Article 226 of the Constitution so as to seek ouster of the disqualified successful candidate, any person does not exclude the unsuccessful

candidate who though could also challenge such election in an election petition but did not file any such election petition. It is trite law that a precedent is an authority for what it actually decides and not what can be logically deduced therefrom. It is also well-settled that ratio of a judgment must be understood having regard to facts situation obtaining therein. In order therefore to cull out the ratio of a judgment, the law laid down therein has to be ascertained by analysing the material facts and the issues involved in the case and arguments of both the sides. What has been held in a given case should be read with reference to facts situation of that case in the context of particular statutory provision interpreted by the court. It has therefore been often reiterated as a principle on the law of precedents by the Supreme Court that a decision cannot be relied on in support of a proposition which it did not actually decide and that the courts should not place reliance on decisions without discussing as to how the factual situation of the case before it fits in the facts situation of the decision on which reliance has been placed.

14) What was observed in para 33 of the report was in fact founded on the judgment of the Supreme Court in K.Venkatachalam supra and therefore this court has to look at the ratio of K.Venkatachalam supra to come to a correct conclusion to test the correctness of the argument advanced on behalf of respondent No.2. K.Venkatachalam supra was a case where the original writ petitioner, A.Swamickan, challenged election of appellant K.Venkatachalam by filing a writ of quo warranto on the premise that the elected candidate K.Venkatachalam was not qualified to be elected as member of Tamilnadu Legislative Assembly since he was not an elector in the electoral roll of the Lalgudi Assembly Constituency for the general elections in question. He was therefore required to show under what authority he was occupying the seat in Tamil Nadu Legislative Assembly as a member representing Lalgudi Assembly Constituency. He impersonated himself for another person of the same name in the electoral roll of the same constituency, thus, he swore a false affidavit that he was elector of that constituency. An argument similar to the one which is being

raised in the present writ petition was raised in that case too that in view of the bar contained in Article 243-O of the Constitution, which is an analogous provision to Article 329(b) of the Constitution, the High Court could not exercise its writ jurisdiction under Article 226 of the Constitution and a writ of *quo warranto* could not be therefore issued at the instance of a candidate who was defeated in the self-same election. The High Court allowed the writ petition and declared that the elected candidate K.Venkatachalam was not qualified to be member of Tamil Nadu Legislative Assembly as he did not possess the basic qualifications prescribed in Clause (c) of Article 173 of the Constitution read with Section 5 of the Representation of the People Act, 1951. The Supreme Court rejected the argument that the writ petition would not be maintainable just because the original writ petitioner had also contested the election and he could file but he did not file the election petition. This argument therefore merits rejection and is accordingly rejected.

15) Adverting now to the argument that in

view of the bar contained in Article 243-O of the Constitution which is analogous to Article 329(b) of the Constitution that no election to any Panchayat shall be called in question except by a election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State, it may be noted that a similar argument was raised before the Supreme Court in K.Venkatachalam, supra, albiet, with reference to Article 329(b) of the Constitution, based on its earlier judgments in **N.P. Pomuswami Vs Returning Officer, Namakkal Constituency : AIR 1952 SC 64, Election Commission of India Vs. Saka Venkata Rao : AIR 1953 SC 210, Durga Shankar Mehta Vs. Raghuraj Singh : AIR 1954 SC 520, Hari Vishnu Kamath Vs. Ahmad Ishaque : AIR 1955 SC 233, Brundaban Nayak Vs. Election Commission of India : AIR 1965 SC 1892, Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi : AIR 1978 SC 851, Krishna Ballabh Prasad Singh Vs. Sub-Divisional Officer Hilsa-cum-Returning Officer : AIR 1985 SC 1746 and Election Commission of India Vs. Shivaji : AIR 1988 SC 61.** Their lordships in

para 20 of the said judgment distinguished the cases where the High Court is approached under Article 226 of the Constitution of India at a time when the election process is still on and after the period of filing election petition is over and held that there is no provision that under the Act election petition can be filed beyond the period of limitation. That being so, the question to be asked is if the person questioning the validity of election is without any remedy particularly when it is established that the elected person did not have the qualification to be elected to the Assembly. Relevant portion of discussion made in para 20 of the said report is reproduced hereinbelow:-

> “Election petition under Section 81 of the Act had to be filed within forty-five days from the date of election of the returned candidate, that is the appellant in the present case. This was not done. There is no provision under the Act that an election petition could be filed beyond the period of limitation prescribed under Section 81 of the Act. That being so the question arises if the respondent is without any remedy particularly when it is established that the appellant did not have the qualification to be elected to the Tamil Nadu Legislative Assembly, from Lalgudi Assembly Constituency.”

16) In para 27 of the said judgment, the Supreme Court answered the aforesaid questions in the following words:-

> “Various decisions of this Court which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?”

17) Full Bench of the Punjab and Haryana High Court also in Lal Chand Vs. State of Haryna and others : AIR 1999 Punjab & Haryana 1 has held Articles 243-0 and 243ZG of the

Constitution which exclude jurisdiction of the High Courts under Article 226/227 of the Constitution and Supreme Court under Article 32 of the Constitution, respectively shall have to be read down. It is therefore that the provision contained in Article 243-O of the Constitution cannot be so interpreted as to exclude the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India and Supreme Court under Article 32 of the Constitution of India for examining the question of issuing a writ of *quo warranto* in a particular case where the elected candidate is stated to have suffered from proven disqualification.

18) The Supreme Court in K.Venkatachalam supra categorically ruled that Article 226 of the Constitution is couched in widest possible terms and unless there is clear bar to the jurisdiction of the High Court, its powers under Article 226 of the Constitution can be exercised by the court when there is an act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. It was

further held that in the circumstances, like the present one, bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution.

19) It would thus be evident on the facts stated above that the respondent No.2 was disqualified to contest the election in view of the bar contained in Section 19(gg) of the Act of 1994 which was enacted by the State Legislature as per the mandate of Article 243 (F) of the Constitution which inter-alia provides that:-

> "(1) a person shall e disqualified for being chosen as, and for being, a member of a Panchayat-
> (b) if he is so disqualified by or under any law made by the Legislature of the State."

20) Full Bench of Punjab and Haryana High Court in Lal Chand supra has also held that despite the bar imposed under Arts.243-0 and

243-ZG of the Constitution of India, the election of the Panchayat/Municipality can be challenged directly before the High Court under Arts. 226/227 of the Constitution of India, otherwise those Articles would be against the basic structure of the Constitution i.e. the power of judicial review of the High Court. It was held that the High Court, however, keeping in view the facts and circumstances of the case may relegate the petitioner to the remedy available before the Election Tribunal. In the present case, however, it is admitted case that the period of limitation having elapsed, no such remedy is now available to the petitioner and, therefore, same situation which was there before the Supreme Court in K.Venkatachalam supra has now presented itself before this court. It would be apposite to extract the relevant part in Lal Chand supra wherein the Full Bench of the Punjab and Haryana High Court in para 32 of the report held as under:-

> “The jurisdiction conferred upon the High Court under Arts.226/227 and upon the Supreme Court under Art.32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction

> cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Arts.226/227 and 32 of the Constitution. The Tribunals created under Art.323-A and Art.323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of those Tribunal will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned? Tribunal falls. The Tribunals will, nevertheless continue to act like Courts of first instance in respect of the areas of law for which they have been constituted."

21) Co-ordinate Bench of this Court in Bhiva Ram and others Vs. State of Rajasthan and others : 2000(3) WLC (Raj.) 645 reiterated the same view as was taken by the Supreme Court in K.Venkatachalam supra and Full Bench of the Punjab and Haryana High Court in Lal Chand supra and I am in respectful agreement therewith.

22) Coming now to the argument that the remedy of writ of *quo warranto* being discretionary remedy, this Court should decline to issue such writ in the facts of the present case when now respondent No.2 has been acquitted of all the charge for various offences framed against him. The argument is

that by application of theory of relation back innocence of respondent No.2 now having been established with his acquittal, it should relate back to the date of election and it should be assumed that as if no criminal case was ever pending against him. Such an argument cannot be accepted in view of the law laid down by the Constitutional Bench of the Supreme Court in K.Prabhakaran supra, in para 44 of the report whereof, it was held that appellate judgment of a date subsequent to the date of nomination or election, as the case may be, and having a bearing on conviction of a candidate or sentence of imprisonment passed on him would not have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than two years was actually and as a fact was disqualified from filing nomination and contesting the election on the date of nomination or election, as the case may be. Though stated disqualification in that case as per Section 8(3) of the Representation of Peoples Act, 1951 was conviction but here in

this case, it is the cognizance taken and charge framed for any offence punishable with imprisonment of five years or more. Ratio of the Supreme Court judgment in K.Prabhakaran would therefore apply to the present case on all its four corners.

23) The other argument such as petition of *quo warranto* being prayed for in the personal interest of petitioner and not for any public good concerning people at large also cannot be accepted because everything will turn out on the fact whether the respondent No.2 made a false declaration on the date of submitting nomination paper and whether on that day he was disqualified to contest the election as per the law enacted by the Legislature of the State contained in Section 19(gg) of the Act of 1994, whatever may be consequences. The judgment of the Andhra Pradesh High Court in Mocherla Venkataraya Sarna does not help the petitioner in any manner because what was held in that judgment was that a writ of *quo warranto* "would lie even at the instance of a relator who has no personal interest in the matter. Information in the nature of *quo warranto* could be filed in the case of

Municipal Corporations or Local Boards on the relation of private parties. It is open to a private individual to bring it to the notice of the Court that a person who is disqualified to hold an office is still holding." This observation cannot be read to mean that the court held that a person who had personal interest in the matter would not have *locus standi* to approach the court for issuance of writ of *quo warranto*. A meaning which does not flow from the wordings of the judgment, cannot be attributed to it. Judgment of the Orissa High Court in Haladhar Panda supra also does not offer any assistance to the respondent No.2 because what was held in that case was that a "writ of *quo warranto* is not issued as a matter of right" and it "is a discretionary relief and the Court has always to ask itself whether under the circumstances of each case, the petitioner should be given the relief in the nature of quo warranto which he seeks." But, those observations were made by the court in the context of the facts that the very same petitioner had earlier also filed a writ petition challenging the election of the

defeated candidate but did not raise contention that his election was contrary to provisions of Section 16(3)(a) of the Orissa Panchayat Samiti Act of 1959 as it barred re-election for a third consecutive term. That writ petition was dismissed on merits and thereafter writ of *quo warranto* was filed. It was in that context that the Orissa High court took a view that court that "where there were statutory provisions dealing with the conduct of an election, the right to *quo warranto* must be taken to be displaced." Later observations now stand impliedly over ruled by the ratio of the judgment of the Supreme Court in K.Venkatachalam supra. Argument of delay in approaching this court also cannot be accepted because delay of almost one year was also there in the case of K.Venkatachalam wherein the Supreme Court interpreted the same to mean that now the defeated candidate had no other remedy except to approach the High Court under Article 226 of the Constitution.

24) In view of what has been discussed above, the present writ of *quo warranto* deserves to be allowed and the same is

accordingly allowed.

25) Respondent No.2 is held to be disqualified to continue as Member of Ward No.25 of Panchayat Samiti, Buhana and consequently, as Pradhan, Panchayat Samiti, Buhana and writ of *quo warranto* for removing him from the aforesaid offices is hereby issued and the offices held by him are declared vacant. Consequences to follow.

In the facts of the case, the parties are left to bear their own costs.

(MOHAMMAD RAFIQ), J.

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Superintendent cause List Section

List the following two judgments heard by Hon'ble Mr.Justice Mohammad Rafiq for pronouncement of order on 19/11/2007 in the cause list of Court No.18:-

1) S.B.C.W.P. NO.3074/2006.

Dharam Singh
Versus
State of Rajasthan & Ors.

Shri S.M. Mehta, Senior Advocate with
Shri Rajendra Prasad for the petitioner.
Shri R.N. Mathur with
Shri Ashvini Jaiman for respondent No.2.
Shri B.K. Sharma, Deputy Govt.Advocate for State.

2) S.B. CIVIL WRIT PETITION NO.2279/2007.
Gomti Devi and ors.
Vs.
Smt.Asharfi Devi and anr.

Shri Saransh Saini with
Shri Laxmikant Taylor for the petitioners.
Shri S.K. Gupta with
Shri Rajnish Gupta for the plaintiff-respondent No.1.

BY ORDER

COURT MASTER
Court No.18.

Dt.16/11/2007.